Choice of Law Issues in Tort-based Climate Change Litigation

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Abstract

The human cause of climate change (greenhouse gas emissions) and its consequences can occur in different states. This is a challenge for domestic law, and a significant obstacle in tort claims brought by victims of climate change against greenhouse gas emitters in domestic courts. If a Canadian court asserts jurisdiction over such a claim, it must decide which law applies. In a tort dispute, the court will typically apply the law of the place where the tort occurred (the lex loci delicti*). Climate change litigation, however, makes it exceedingly difficult to locate the tort in a single place and to identify the applicable law. This paper investigates choice of law rules that apply in common law Canada and in Quebec and articulates how those rules would apply in tort-based climate change litigation brought against local or foreign greenhouse gas emitters. It suggests that the law of the place of injury will normally apply, although uncertainty persists in the case law.*

Table of Contents

Introduction
1. Choice of law: the law of the place of injury as a general principle
    1.1. Choice of law in common law Canada: the law of the place of the tort
        1.1.1. *Tolofson* and complex torts
        1.1.2. *Tolofson* and tort-based climate change litigation
        1.1.3. The imapct of the *Transboundary Pollution Reciprocal Access Act*
    1.2. Choice of law in the *Civil Code of Quebec*: the law of the (foreseeable) palce of injury
2. Displacing the applicable law: public law, public policy, and mandatory foreign laws as corrective mechanisms
    2.1. Refusal to apply foreign law
        2.1.1. The public law exception
        2.1.2. The public policy exception
    2.2. Mandatory foreign laws.
Conclusion

Introduction

Climate change litigation is gaining traction around the world as victims of climate change are suing governments and greenhouse gas (GHG) emitters in domestic courts, in an effort to get compensation or prevent further damage.[1] While governments have been the primary target in Canada (through public law),[2] other countries have also seen *tort* claims brought against GHG emitters or public authorities.[3] These attempts represent only a small fraction of the claims,[4] and they have been largely unsuccessful so far. But climate change litigation is still in its infancy and momentum could easily shift, as commentators have suggested.[5]

Canada remains vulnerable to tort-based climate change litigation because it hosts a strong fossil fuel industry. Indicators issued by the Canadian government in August

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[1] See generally Ivano Alogna, Christine Bakker & Jean-Pierre Gauci, eds, *Climate Change Litigation: Global Perspectives* (Leiden: Brill Nijhoff, 2021); Francesco Sindico & Makane Moïse Mbengue, eds, *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Cham: Springer, 2021); Wolfgang Kahl & Marc-Philippe Weller, eds, *Climate Change Litigation: A Handbook* (Oxford: Hart, 2021) [Kahl & Weller]. In 2022, the Intergovernmental Panel on Climate Change (IPCC) concluded, on the basis of "robust evidence" and a "high agreement" that "[o]utside the formal climate policy processes, climate litigation is another important arena for various actors to confront and interact over how climate change should be governed": Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change – Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (April 2022) at 1375, online (pdf): *IPCC* <https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf> [https://perma.cc/9B77-Z8M3].

[2] See eg *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871, leave to appeal to SCC refused, 2022 CanLII 67615; *Mathur v Ontario*, 2020 ONSC 6918; *La Rose v Canada*, 2020 FC 1008; *Turp v Canada (Minister of Justice)*, 2012 FC 893; *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183, aff'd 2009 FCA 297, leave to appeal to SCC refused, [2010] 1 SCR ix. See generally Sébastien Jodoin & Morgan McGinn, "Climate Change Litigation in Canada" in Kahl & Weller, *supra* note 1 at 253.

[3] In the U.S., see eg *City of New York v Chevron Corp*, 993 F (3d) 81 (2nd Cir 2021). In New Zealand, see *Smith v Fonterra Co-Operative Group Ltd*, [2021] NZCA 552. In Germany, see the pending case of *Lliuya v RWE AG*: Sarah Kaplan, "A Melting Glacier, An Imperiled City and One Farmer's Fight for Climate Justice", *The Washington Post* (28 August 2022), online: <https://www.washingtonpost.com/climate-environment/interactive/2022/peru-climate-lawsuit-melting-glacier/> [https://perma.cc/KQ3A-FVNM].

[4] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot* (June 2022), online (pdf): *London School of Economics and Political Science* < https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> [https://perma.cc/6WDD-34CE].

[5] Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38:4 Oxford J Leg Stud 841.

2022 rank the country as the tenth GHG emitting country/region in the world in 2019.[6] By Canada's own account, its GHG emissions have increased by 13.9% between 1990 and 2021, a growth "driven primarily by increased emissions from the oil and gas as well as the transport sectors."[7] The oil and gas sector accounted for 28% of Canada's emissions in 2021 and its emissions increased by 88% between 1990 and 2021. Crude oil production "more than doubled" during that period, which resulted in a 24% increase in emissions from conventional production and a stunning 463% increase in emissions from oil sands production (which is more GHG-intensive).[8] Meanwhile, natural gas production from unconventional sources such as fracking also increased, which led to a 55% surge in emissions.[9] The industry's part of responsibility in climate change is hard to deny, and the people who suffer from climate change in Canada and elsewhere may well turn to Canadian courts to obtain compensation.

Private law has important limitations when it comes to environmental protection,[10] but the literature shows that tort law can nonetheless play a significant role in risk regulation.[11] The use of private law to enforce environmental rights and obligations "can guide the implementation and interpretation of regulation, fill gaps in regulatory regimes, and provide alternative avenues and new innovations to protect environmental values and incentivize sustainable development of natural resources."[12] From this angle, tort-based climate change litigation is one of the many tools available to deter wrongdoing and to compensate victims. As Professors Collins and McLeod-Kilmurray explain, "[u]ntil the international, national, or local legislatures take clear and effective action to reduce GHG emissions and mitigate the risks of climate change, litigants will likely continue to pursue their claims in courts, and tort law will have an

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[6] Environment and Climate Change Canada, *Canadian Environmental Sustainability Indicators – Global Greenhouse Gas Emissions* (August 2022) at 5, online (pdf): *Government of Canada* <https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/global-ghg-emissions/2022/global-greehouse-gas-emissions-en.pdf>. The top ten includes nine countries and the European Union (comprised of twenty-seven countries).

[7] Environment and Climate Change Canada, *Canadian Environmental Sustainability Indicators – Greenhouse Gas Emissions* (April 2023) at 5–6, online (pdf): *Government of Canada* <https://www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/ghg-emissions/2023/greenhouse-gas-emissions-en.pdf>.

[8] *Ibid* at 9.

[9] *Ibid*.

[10] See eg Penelope Simons & Heather McLeod-Kilmurray, "Canada: Backsteps, Barriers and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm" in Uglješa Grušić & Ekaterina Aristova, eds, *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (London: Hart, 2022) 109 at 124–32; Bruce Ziff, "Environmental Protection and the Abject Failures of the Common Law" (2020) 71 UNBLJ 3.

[11] See eg Douglas A Kysar, "The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism" (2018) 9:1 Eur J Risk Reg 48.

[12] David Grinlinton, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62:3 McGill LJ 633 at 636.

important role in deterring and compensating for climate-related harms."[13] Tort-based climate change litigation may even become the subject of legislative interest, if governments choose to go after the fossil-fuel industry themselves and have statutes enacted to facilitate their claims, as they did in their fight against tobacco manufacturers.[14]

Tort litigation occurs in domestic courts. Climate change, however, is a global phenomenon which challenges the territorial reach of domestic law, and with it the authority of domestic courts.[15] The Supreme Court of Canada recently described three unique features of climate change in that regard:

> First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. […] Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.[16]

As a result of those unique features, some instances of tort-based climate change litigation will have transboundary implications, if they involve local victims of climate change suing a foreign GHG emitter or, conversely, foreign victims suing a Canadian emitter.[17] In these scenarios, litigants must account for private international law, which articulates rules of jurisdiction and choice of law. Jurisdiction relates to the possibility for domestic courts to hear a claim on the basis of a sufficient connection with the forum. Choice of law refers to the law – domestic or foreign – that applies to that claim. The rules of private international law are an important factor in predicting the success or failure of a tort-based climate change lawsuit, and scholars have already begun to study the issue.[18]

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[13] Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at 294 [Collins & McLeod-Kilmurray].

[14] For parallels, see Martin Olszynski, Sharon Mascher & Meinhard Doelle, "From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability" (2017) 30:1 Geo Envtl L Rev 1.

[15] But see Cinnamon Carlarne, "Delinking International Environmental Law and Climate Change" (2014) 4:1 Michigan J Environmental & Administrative L 1; Hari M Osofsky, "Is Climate Change 'International'? Litigation's Diagonal Regulatory Role" (2009) 49:3 Va J Intl L 585 (both challenging discourses which present climate change predominantly as an "international" problem or a matter of international environmental law).

[16] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 12 [*References re Greenhouse Gas Pollution Pricing Act*].

[17] For the purposes of this paper, "local" refers to Canada. Furthermore, "Canadian private international law" or "Canadian courts" refer to the law and courts of each Canadian province including Quebec, unless stated otherwise.

[18] See generally Eva-Maria Kieninger, "Conflicts of Jurisdiction and the Applicable Law in Domestic Courts' Proceedings" in Kahl & Weller, *supra* note 1, 119; Eduardo Álvarez-Armas, "SDG 13: Climate

As demonstrated in previous work, it is entirely conceivable that the courts of a Canadian province will assert jurisdiction over a tort-based climate change lawsuit, either because a GHG emitter operates in the forum, or because a foreign GHG emitter caused an injury in the forum (for instance, loss of property or revenue after flooding).[19] But which law should the court apply, assuming it has jurisdiction? In a tort dispute, Canadian courts will typically apply the law of the place where the tort occurred (the *lex loci delicti*). Climate change litigation, however, makes it exceedingly difficult to locate the tort in a single place and to identify the applicable law. Yet the *lex loci delicti* forces a determination because only a single law can apply to a dispute. In other words, the tort *must* occur at the place of acting or the place of injury, or else the *lex loci delicti* remains indeterminate.

Some jurisdictions have recognized this problem and adopted specific choice of law rules to deal with transboundary environmental damage, often with a bias towards the victim. In the European Union, for instance, article 7 of the *Rome II Regulation* ("*Rome II*") allows victims of environmental damage to choose between the law of the country in which damage occurred (the general rule for most torts) or the law of the country in which the events giving rise to environmental damage occurred.[20] *Rome II* defines environmental damage as an "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms."[21] Dutch courts recently relied on article 7 of *Rome II* to apply Dutch law in *Milieudefensie v Shell*, a landmark ruling which held that Netherlands-based Royal Dutch Shell had an obligation to reduce its global CO_2 emissions by a net 45% in 2030 compared to 2019 levels.[22] The Hague District Court

Action" in Ralf Michaels, Verónica Ruiz Abou-Nigm & Hans van Loon, eds, *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law* (Cambridge: Intersentia, 2021) 409; Olivera Boskovic, "Le contexte transnational en matière de responsabilité climatique" in Mathilde Hautereau-Boutonnet & Stéphanie Porchy-Simon, eds, *Le changement climatique, quel rôle pour le droit privé?* (Paris: Dalloz, 2019) 193; Fanny Giansetto, "Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique" [2018] 2 Journal du droit international 507; Michael Byers, Kelsey Franks & Andrew Gage, "The Internationalization of Climate Damages Litigation" (2017) 7:2 Washington J Environmental L & Policy 264 at 285–302. On private international law and environmental damage more generally, see eg Charlotte Guillard, "Protection de l'environnement et justice conflictuelle: une nouvelle équation pour le droit international privé?" [2022] 2 Rev crit dr intl priv 251; Christian von Bar, "Environmental Damage in Private International Law" (1997) 268 Recueil des Cours 291.

[19] Guillaume Laganière, *Liability for Transboundary Pollution at the Intersection of Public and Private International Law* (Oxford: Hart, 2022) ch 3; Guillaume Laganière, "Local Polluters, Foreign Land and Climate Change: The Myth of the Local Action Rule in Canada" (2020) 16:3 J Priv Intl L 390.

[20] EC, *Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40, art 7.

[21] *Ibid*, preamble at para 24.

[22] *Milieudefensie et al v Royal Dutch Shell plc*, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (Rechtbank Den Haag) (appeal filed), English court translation online:

reasoned that climate change due to CO_2 emissions was environmental damage under *Rome II*,[23] and that the corporate policy of Shell in the Netherlands represented an "event giving rise to environmental damage" such that plaintiffs (various environmental organizations and individuals) could elect Dutch law to govern the case.[24] The United Nations Environment Programme (UNEP) also developed guidelines for the development of domestic liability laws, which include a choice of law rule similar to article 7 of *Rome II*.[25]

No such provision exists in Canada, however. General choice of law rules will apply in most cases,[26] albeit with considerable uncertainty given how difficult it is to pin climate change down to a single place. This uncertainty prevents both plaintiffs and defendants from assessing the full scope of their substantive rights and obligations in domestic courts. It also hinders our understanding of the viability and potential of climate change litigation in Canada, as it is unclear which law would even apply to a tort claim, let alone whether it would provide a remedy for climate-related harm.

This paper brings clarity to this issue: it investigates choice of law rules for torts in common law Canada and in Quebec and articulates how such rules would apply in tort-based climate change litigation – whether it involves local victims suing a foreign GHG emitter or foreign victims suing a local emitter. The paper investigates both the law applicable to torts as designated by choice of law rules (1), and the displacement of that law through mechanisms such as the public law exception, the public policy exception, or the doctrine of mandatory foreign laws (2). This paper demonstrates that the law of the place of injury will normally apply in tort-based climate change litigation, and that the applicable law will rarely be displaced by another. Uncertainty will persist, however, until appellate courts re-examine the scope

<https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339>. See generally Chiara Macchi & Josephine van Zeben, "Business and Human Rights Implications of Climate Change Litigation: *Milieudefensie et al. v Royal Dutch Shell*" (2021) 30:3 RECIEL 409.

[23] *Ibid* at para 4.3.2.

[24] *Ibid* at paras 4.3.3–4.3.7. See Madeleine Petersen Weiner & Marc-Philippe Weller, "The "Event Giving Rise to the Damage" under Art. 7 Rome II Regulation in CO2 Reduction Claims – A Break Through an Empty Shell?" (2 January 2023), online (blog): *Conflict of Laws.net* < https://conflictoflaws.net/2023/the-event-giving-rise-to-the-damage-under-art-7-rome-ii-regulation-in-co2-reduction-claims-a-break-through-an-empty-shell/> [https://perma.cc/W3JM-4MPD].

[25] *Guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment*, UNEPGC Dec SS.XI/5 B in UNEP Governing Council, Report of the Governing Council/Global Ministerial Environment Forum on the work of its eleventh special session, UNGAOR, 65th Sess, Supp No 25, UN Doc A/65/25 (2010) at 18–22 ("[s]ubject to domestic laws on jurisdiction and in the absence of special rules established by contract or international agreement, any claim for compensation that raises a choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred", guideline 13).

[26] Except for some Canada-U.S. disputes governed by a statute on transboundary pollution: see section 1.1.3 below.

of the *lex loci delicti* or governments choose to enact statutory choice of law rules for environmental damage. Until then, it will remain difficult to fully assess the rights and obligations of GHG emitters and victims of climate change under domestic tort laws.

1. Choice of law: the law of the place of injury as a general principle

This section analyzes choice of law rules for torts as they apply to tort-based climate change litigation. In common law provinces, litigants may rely on negligence, nuisance, trespass, strict liability or statutory causes of action if applicable.[27] In Quebec, environmental litigation (including climate change litigation) may involve fault-based liability (art 1457 CCQ) or no-fault neighbourhood disturbance (art 976 CCQ).[28] This section investigates the common law rule of the *lex loci delicti* (the law of the place of the tort) (1.1) and Quebec's particular iteration of the *lex loci delicti* in the CCQ (1.2). It concludes that the law of the place where the injury was suffered (as opposed to the law of the place where a wrongful act was committed) will likely apply in tort-based climate change litigation.

At the outset, it is important to remember that Canadian courts cannot raise foreign law on their own motion if parties choose not to plead foreign law. Local law will then apply by default, regardless of choice of law rules.[29] Furthermore, overriding mandatory rules in the forum may supersede the choice of law process entirely if "vital interests" of the forum are at stake, which exceptionally results in the application of local law.[30]

1.1. Choice of law in common law Canada: the law of the place of the tort

Since the Supreme Court of Canada released its judgment in *Tolofson*,[31] courts in common law provinces apply the law of the place where the tort occurred to assess

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[27] Collins & McLeod-Kilmurray, *supra* note 13 at 282–92. See eg *Smith v Inco*, 2011 ONCA 628, leave to appeal to SCC refused, [2012] 1 SCR xii, reconsideration refused, [2014] 2 SCR ix.

[28] See eg *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC Inc (Iron Ore Company of Canada)*, 2014 QCCS 4403, leave to appeal to CA refused, 2015 QCCA 2, leave to appeal to SCC refused, [2015] 3 RCS vi. On civil law remedies for environmental damage, see generally Marie-Ève Arbour, "Liability Law and Nuisance in the Civil Law Tradition" in LeRoy Paddock, David L Markell & Nicholas S Bryner, eds, *Elgar Encyclopedia of Environmental Law*, vol 4 (Cheltenham: Edward Elgar, 2017) 74.

[29] *Civil Code of Quebec*, Art 2809, para 2 [CCQ]; *Pettkus v Becker*, [1980] 2 SCR 834 at 853–54.

[30] Art 3076 CCQ; *B(G) c C(C)*, [2001] RJQ 1435 at 1440 (CA). The common law is less principled on this point, but for a somewhat equivalent mechanism, see eg *Paniccia v MDC Partners Inc*, 2017 ONSC 7298 at paras 81–97 (resorting to the "long-arm jurisdiction" of a statutory cause of action to apply domestic securities legislation "extraterritorially", regardless of choice of law rules).

[31] *Tolofson v Jensen*, [1994] 3 SCR 1022 [*Tolofson*].

cross-border tort claims.[32] The crux of the matter consists in determining whether a tort occurs at the place of acting or the place of injury for choice of law purposes. This has been a difficulty since *Tolofson*, and it is only aggravated by the transboundary features of climate change.

This section introduces *Tolofson* and its application to complex torts, that is, torts in which the fault and the resulting injury are geographically disassociated (1.1.1.). The section then proceeds to apply *Tolofson* to tort-based climate change litigation specifically (1.1.2.). It concludes with a brief analysis of statutory choice of law rules adopted in some Canadian provinces and American states to deal with Canada-U.S. transboundary pollution (1.1.3).

1.1.1. *Tolofson* and complex torts

Before 1994, Canadian courts applied the English common law rule articulated in *Phillips v Eyre*.[33] A remedy was available in Canadian courts for an injury caused by an act committed abroad only if the act: (1) would have been civilly actionable in the forum if it had been committed there; and (2) was unjustifiable under the law of the place where it had actually been committed.[34] In *Tolofson*, the Supreme Court replaced that double-barrelled approach with the *lex loci delicti* (the law of the place of the tort) on the basis that it met normal expectations and that it was certain, easy to apply, predictable and in line with a growing international consensus.[35] Importantly, the Court associated the *lex loci delicti* with "the law of the place where the activity occurred".[36] As the Court would explain in a subsequent case, "the rationale for the rule is that in the case of most torts, the occurrence of the wrong constituting the tort is its most substantial or characteristic element, and the injury or consequences are typically felt in the same place".[37]

Tolofson recognized two broad sets of circumstances calling for adjustments to the *lex loci delicti*.[38] The first concerns a small subset of international cases – but not interprovincial ones – in which the *lex loci delicti* works an injustice justifying the

[32] This paper does not discuss the "common residence" exception to the law of the place of the tort, which may come into play when the parties reside in the same jurisdiction, but the tort occurred elsewhere: *Tolofson*, *supra* note 31 at 1057; Art 3126 CCQ at para 2.

[33] *Phillips v Eyre* (1870), LR 6 QB 1.

[34] *Samson v Holden*, [1963] SCR 373 at 378–79; *McLean v Pettigrew* (1944), [1945] SCR 62 at 76–77. For a historical account of the law in England and in Canada, see *Tolofson*, *supra* note 31 at 1039–46.

[35] *Tolofson*, *supra* note 31 at 1049–51.

[36] *Ibid* at 1050.

[37] *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18 at para 50 [*Écosociété*].

[38] The Court also opened the door to a public policy exception overriding the *lex loci delicti*: *Tolofson*, *supra* note 31 at 1054–55 and section 2.1.2 below.

application of local law instead.[39] The second – more relevant for climate change litigation – has to do with pure transboundary damage, that is, "complex" torts which involve an act in one place and an injury in another. In an oft-quoted statement, Justice La Forest, writing for the majority, explained that some torts are not easily located for the purposes of identifying the *lex loci delicti*:

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. *There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role.*[40]

The Court strongly suggests here that when an act and its consequences occur in different states, the *lex loci delicti* is the law of the place of injury. This is a departure from the Court's general understanding of the *lex loci delicti* as the law of the place of acting. Justice La Forest's statement, however, raises more questions than answers. It implies that "torts arising directly from transnational/interprovincial activity" are somehow different from transboundary torts but does not explain what the difference might be. Climate change, for instance, can certainly be both. Nor does it explain the circumstances in which the damage will indeed constitute the wrong for choice of law purposes. Justice La Forest himself mentioned libel as a tort potentially occurring at the place of publication.[41] Subsequent jurisprudence confirmed that in this context, the *lex loci delicti* is indeed the law of the place of publication, that is, where the defamatory statement is communicated and its reputational effects are felt.[42] But the law is not always as clear for other torts.[43] As the Ontario Superior Court of Justice noted, "*Tolofson* clearly recognizes the complexities of trans-border torts and refrains

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[39] *Tolofson*, *supra* note 31 at 1054.

[40] *Ibid* at 1050 (emphasis added).

[41] *Ibid* at 1041–42.

[42] *Haaretz.com v Goldhar*, 2018 SCC 28 at paras 84–88 [*Goldhar*]; *Breeden v Black*, 2012 SCC 19 at paras 32–33 [*Breeden*]; *Écosociété*, *supra* note 37 at para 62.

[43] See eg *Barrick Gold Corporation v Goldcorp Inc*, 2011 ONSC 3725 at paras 645–55 (where the court referred both to a "defining activity" test and a "consequences felt" test to locate torts of inducing breach of contract, interference with contractual relations and conspiracy).

from making a definitive statement that the place of the tort is always where the harm was suffered."[44]

The localization of torts for choice of law purposes came back to the Supreme Court in *Écosociété* and *Breeden* (2012), two cross-border defamation cases.[45] The debate on the appropriate choice of law rule for defamation stemmed from the fact that the *lex loci delicti* could have led to the application of different laws in different courts if a defamatory statement was published in multiple places, thus favouring libel tourism – a situation further exacerbated if the statement was posted online and made available worldwide.[46] In a lengthy *obiter*, Justice LeBel, writing for the Court in *Écosociété*, questioned whether the *lex loci delicti* (defined in this context as the law of the place of publication) or the law of the place of the most substantial harm to the reputation should apply to cross-border defamation claims.[47] Justice LeBel refused to give a definite answer.

The Court's restraint makes sense because the two cases did not hinge on choice of law: they involved the jurisdiction of Canadian courts and the doctrine of *forum non conveniens* (the purpose of which is to assess whether another forum is clearly more appropriate for deciding the case[48]). The law applicable to the dispute was merely one of the factors to be considered in deciding whether to decline jurisdiction in favour of another state, and Ontario law applied under either choice of law rule. Yet the Court seemed particularly interested in the issue. Unfortunately, its lengthy detour into *Tolofson*'s territory only caused more confusion, providing "a good example of why common law courts should limit their reasons to the issues that are necessary to decide the case before them."[49] In *Tolofson*, the Court had left the door open to an injury-based definition of the *lex loci delicti* for certain torts. Arguably, the caveat was not so much an exception to the *lex loci delicti* as a different way of locating certain torts in order to identify the *lex loci delicti* – in other words, a different interpretation of the same choice of law rule.[50] The Court, however, went further in

[44] *Silver v Imax Corporation* (2009), 86 CPC (6th) 273 at 324 (Ont Sup Ct), leave to appeal to Ont Div Ct refused, 2011 ONSC 1035.

[45] *Breeden*, *supra* note 42; *Écosociété*, *supra* note 37.

[46] See eg Janet Walker, *Canadian Conflict of Laws*, vol 2, 7th ed (Markham: LexisNexis, 2023) (loose-leaf updated 2023) §17.07 [Walker]; Matthew Castel, "Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet" (2013) 51:1 Alta L Rev 153 at 160–62.

[47] *Écosociété*, *supra* note 37 at paras 49–62. See also *Breeden*, *supra* note 42 at paras 32–33.

[48] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 111–12; *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897 at 915–22.

[49] Brendon Kain, Elder C Marques & Byron Shaw, "Developments in Private International Law: The 2011–2012 Term – The Unfinished Project of the *Van Breda* Trilogy" (2012) 59 SCLR (2d) 277 at 299.

[50] Jean-Gabriel Castel, "Back to the Future! Is the "New" Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33:1 Osgoode Hall LJ 35 at 73 (noting that the Court seemed "prepared to consider the place of injury, that is, where the harm ensued, as the place of tort").

Écosociété: it interpreted *Tolofson*'s caveat as opening the door to brand-new choice of law rules for certain torts, but without settling the issue.[51]

Uncertainty persisted until *Goldhar* (2018), a case which involved jurisdiction over online defamation, and, incidentally, choice of law as part of the *forum non conveniens* analysis.[52] Seven of the nine judges reaffirmed the *lex loci delicti* in defamation disputes (again, defined in this context as the law of the place of publication). Justice Côté, also writing for Justices Brown and Rowe, was not convinced of the need for a new rule on the facts of the case. She did not wish to discourage the Court to hold otherwise in a later case, but only on the basis of proper evidence and submissions.[53] Justice Karakatsanis agreed with "much of [her] reasoning", which presumably includes the appropriate choice of law rule since her reasons do not refer to this issue.[54] Chief Justice McLachlin and Justices Moldaver and Gascon, dissenting on other points, expressly maintained the *lex loci delicti*.[55] Only Justices Abella and Wagner (as he then was), concurring in the result, would have replaced it with the law of the place of substantial harm to the reputation in the context of defamation.[56]

Goldhar thus reinforced the status of the *lex loci delicti* as the choice of law rule for torts, absent future changes in the defamation context. Unfortunately, none of the five sets of reasons clarified *Tolofson*'s caveat on pure transboundary damage. This is disappointing because online defamation is certainly one of the thorny cases that would have preoccupied Justice La Forest in *Tolofson*. Justice Abella briefly made the parallel,[57] but her proposal for a new choice of law rule pre-empted further discussion on the localisation of torts under *Tolofson*'s framework. More fundamentally, her reasons suggest, as did Justice LeBel's in *Écosociété*, that *Tolofson* opened the door to different choice of law rules for certain torts, as opposed to an injury-based definition of the *lex loci delicti* in cases where consequences constitute the wrong.[58] The rest of the bench made no comment on this point. Accordingly, it remains unclear whether the caveat in *Tolofson* supports different choice of law rules for different torts,

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[51] *Écosociété*, *supra* note 37 at paras 50–51.

[52] *Goldhar*, *supra* note 42.

[53] *Ibid* at paras 84–94, Côté J.

[54] *Ibid* at para 99, Karakatsanis J, concurring.

[55] *Ibid* at paras 196–204, McLachlin CJ, Moldaver and Gascon JJ, dissenting.

[56] *Ibid* at paras 104–19 (Abella J, concurring), 144–46 (Wagner J, concurring). Justice Abella would have employed the substantial harm to reputation test jurisdictional purposes as well (*ibid* at paras 120–30). Justice Wagner, by contrast, would have adopted the test for choice of law purposes only (*ibid* at paras 147–49).

[57] *Goldhar*, *supra* note 42 at paras 111–12, Abella J, concurring.

[58] *Ibid*.

or simply different methods of localizing certain torts for the purposes of identifying the *lex loci delicti*.[59]

1.1.2. *Tolofson* and tort-based climate change litigation

The choice of law rule in tort-based climate change litigation thus remains the *lex loci delicti*, for lack of a clear alternative in environmental matters. The question becomes *where* environmental torts occur for choice of law purposes. Climate change is a perfect illustration of the "thorny issues" contemplated by Justice La Forest in *Tolofson* because not unlike defamation, the act occurs in one place and its consequences occur elsewhere (and arguably everywhere). In these circumstances, the *lex loci delicti* could be the law of the place of acting (aligning with *Tolofson*'s definition of the place where a tort generally occurs), but it could also be the law of the place of injury.

The localization of torts in such cases does not follow strict or arbitrary rules. The analysis should focus on where each tort crystallizes, that is, where a cause of action exists.[60] Each tort has its own characteristics which could bear on this inquiry.[61] Jurisdictional rules can be helpful: the Supreme Court of Canada explained in *Goldhar* that "[i]n circumstances where the *situs* of the tort leads to the assumption of jurisdiction in the chosen forum, *lex loci delicti* will inevitably also point to the chosen forum on the question of applicable law."[62] Courts also sometimes rely on jurisdictional precedents to locate torts for choice of law purposes.[63] This said, the processes of assuming jurisdiction on the basis of a tort occurring in the forum and of identifying the *lex loci delicti* remain conceptually distinct. A single applicable law implies that there can only be one place where a tort occurs. Jurisdictional rules call for no such restriction: two states may well have a sufficient interest to hear the dispute if some element of the tort occurred there, even without concluding that the entire tort

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[59] Byron Shaw & Scott Robinson, "*Goldhar v. Haaretz.com*: A Product of the Supreme Court's Unfinished Project to Reform Canadian Private International Law" (2019) 49:2 Adv Q 143 at 166. On the questions raised by *Tolofson* in this regard, see Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 268–70 [Pitel & Rafferty]; Stephen GA Pitel & Jesse R Harper, "Choice of Law for Tort in Canada: Reasons for Change" (2013) 9:2 J Priv Intl L 289 at 295–96.

[60] In the jurisdictional context, see eg *Gulevich v Miller*, 2015 ABCA 411 at paras 37, 43; *Écosociété*, *supra* note 37 at para 3.

[61] In the jurisdictional context, see eg *Ewert v Höegh Autoliners AS*, 2020 BCCA 181 at para 77, leave to appeal to SCC refused, 2021 CanLII 35002 (tort of conspiracy); *Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601 at paras 30–35, leave to appeal to SCC refused, [2014] 1 SCR xiii (tort of negligent misrepresentation).

[62] *Goldhar*, *supra* note 42 at para 90.

[63] See eg *Thorne v Hudson Estate*, 2017 ONCA 208 at paras 7–11, leave to appeal to SCC refused, [2017] 3 SCR x.

occurred there. Thus, "what is meant by the place of a tort can be different in the jurisdiction context than in the choice of law context."[64]

When it comes to tort-based climate change litigation, negligence and property torts must be distinguished. Negligence depends on an injury that completes the tort,[65] and the *lex loci delicti* seems to be the law of the place where that injury occurred.[66] Product liability cases support this proposition. In *Lilydale* (2013), for instance, the plaintiff had bought a fryer from the defendant, an Ontario company, which had caused a fire in the plaintiff's plant in Alberta. The plaintiff sued in negligence. Ontario courts applied the law of Alberta because the damage had occurred there.[67] And in *Ostroski* (1995), the plaintiff had been injured at her residence in Pennsylvania when the chair manufactured by the Ontario defendants had tipped over. Again, the Ontario court applied the law of Pennsylvania because the damage had occurred there.[68] Some cases hint at a similar conclusion in the context of a *forum non conveniens* analysis.[69]

Lilydale and *Ostroski* follow the logic of *Moran*, which held that Canadian courts could assert jurisdiction over a foreign manufacturer if it was reasonably foreseeable that the product would be used in the province.[70] Courts do not discuss whether that foreseeability requirement applies in the choice of law context, such that the law of the place of injury would apply only if a manufacturer could foresee that the product would be used there. In *Ostroski*, however, the Court noted that Pennsylvania was a place "substantially [a]ffected by the defendant's activities or its consequences and the law of which is likely to have been in the contemplation of the parties."[71]

The jurisprudence of the Ontario Court of Appeal also confirms the importance of the place of injury in identifying the law applicable to negligence. In

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[64] Stephen GA Pitel & Vaughan Black, "Assumed Jurisdiction in Canada: Identifying and Interpreting Presumptive Connecting Factors" (2018) 14:2 J Priv Intl L 193 at 197.

[65] In the jurisdictional context, see *SSAB Alabama Inc v Canadian National Railway Company*, 2020 SKCA 74 at paras 61–63, leave to appeal to SCC refused, 2021 CanLII 8837; *Furlan v Shell Oil Co*, 2000 BCCA 404 at para 21, leave to appeal to SCC refused, [2001] 1 SCR xii; *GWL Properties Ltd v WR Grace & Co–Conn* (1990), 50 BCLR (2d) 260 at 264 (CA).

[66] But see *Thind v Polycon Industries*, 2022 ONSC 2322 at paras 48–56 (where the Court insists on a flexible approach to tort-localization and assumes jurisdiction on the basis that the alleged negligent acts or omissions occurred in the forum, even though the resulting injury may have occurred elsewhere).

[67] *Lilydale Cooperative Limited v Meyn Canada Inc* 2013 ONSC 5313 at paras 9–23, aff'd 2015 ONCA 281 [*Lilydale*].

[68] *Ostroski v Global Upholstery Co*, 1995 CarswellOnt 874 at paras 5–15 (Ont Gen Div) [*Ostroski*].

[69] *Fort Hills Energy LP v Jotun AS*, 2019 ABQB 237 at paras 147–57; *Shane v JCB Belgium NV*, 2003 CanLII 49357 at paras 48–51 (Ont Sup Ct).

[70] *Moran v Pyle National (Canada) Ltd* (1973), [1975] SCR 393 at 409.

[71] *Ostroski*, *supra* note 68 at para 13.

Leonard (1997), the plaintiffs had been involved in a car accident during a high-speed police chase which had begun in Ontario and then crossed over into Quebec.[72] They sued the police officers, and the person they were chasing, in negligence. The Court of Appeal had to locate the tort of negligence in either Quebec or Ontario to identify the *lex loci delicti*. The Court of Appeal held that the tort had occurred in Quebec because the injury had occurred there.[73] For the Court of Appeal, no wrong existed without an injury. The plaintiffs sued because they had suffered an injury in Quebec, not because the police had breached a duty they might have had in Ontario.[74] The analogy with transboundary pollution or climate change is admittedly imperfect because *Leonard* involved a car chase across Ontario and Quebec which had resulted in an accident in Quebec. In other words, both the act (or part thereof) and the damage had occurred in Quebec. Nonetheless, *Leonard* was cited and applied in *Lilydale*, a product liability case in which the allegedly negligent act had occurred entirely elsewhere.[75]

Das (2018) illustrates a similar principle.[76] Victims of the tragic collapse of the Rana Plaza building in Bangladesh sued Loblaws – a Canadian retailer that purchased clothes from a manufacturer operating in the Rana Plaza – and Bureau Veritas, a company retained by Loblaws to perform audits of factories in Bangladesh. Among the many disputed issues was the law applicable to claims in negligence and vicarious liability against Loblaws. The plaintiffs argued that Loblaws' wrongful conduct (essentially maintaining the production of garments in Bangladesh despite being aware of the working conditions) had occurred in Ontario, where it operated. Ontario law thus governed the claims even if the resulting injury had occurred in Bangladesh. The trial judge rejected the argument. Citing *Moran*, he held that Loblaws' wrongdoing had "occurred in Bangladesh, the country substantially affected by its acts or omissions and the country whose citizens suffered the consequences of the wrongdoing, and whose law was in the reasonable contemplation of the parties".[77] Hence the *lex loci delicti* was Bangladeshi law.[78] The Court of Appeal affirmed that judgment and recalled that the injury in Bangladesh had "crystallized the alleged wrong" there.[79] Both courts relied on *Leonard* in their reasons.[80]

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[72] *Leonard v Houle* (1997), 36 OR (3d) 357 (Ont CA), leave to appeal to SCC refused, [1998] 1 SCR xi.

[73] *Ibid* at 364.

[74] *Ibid* at 364–65.

[75] *Lilydale*, *supra* note 67 at para 23.

[76] *Das v George Weston Ltd*, 2018 ONCA 1053 at para 90, leave to appeal to SCC refused, [2019] 3 SCR vi [*Das* ONCA].

[77] *Das v George Weston Limited*, 2017 ONSC 4129 at para 248, aff'd 2018 ONCA 1053, leave to appeal to SCC refused, [2019] 3 SCR vi [*Das* ONSC].

[78] *Ibid* at para 265.

[79] *Das* ONCA, *supra* note 76 at paras 90–91.

[80] *Ibid* at para 89; *Das* ONSC, *supra* note 77 at para 241.

Although property torts call for a different analysis, the *lex loci delicti* is also likely to be the law of the place where the injury occurred. Authorities are scant, but trespass and nuisance involve interference with property. They have natural connections with the place where property is located, that is, the place of injury.[81] And even if "the wrongful act takes place in a different jurisdiction, the location of the property is probably still the weightiest factor in determining the *lex loci delicti*".[82]

As a result, it seems clear that tort-based climate change litigation in Canada will require consideration of the law of the place of injury under *Tolofson*. The law of the forum will apply if the plaintiffs are local victims who sue, in their own jurisdiction, a foreign GHG emitter. Conversely, foreign law will apply if plaintiffs are foreign victims who sue a Canadian GHG emitter in its own jurisdiction.

1.1.3. The impact of the *Transboundary Pollution Reciprocal Access Act*

The rule set out in *Tolofson* applies in all common law provinces. Ontario, Manitoba, Nova Scotia, and Prince Edward Island, however, have also adopted statutory choice of law rules for environmental disputes, through the *Transboundary Pollution Reciprocal Access Act*.[83]

The Act derives from an instrument drafted in the 1980s by the Uniform Law Conference of Canada (ULCC) and its American counterpart.[84] The Act seeks to ensure that any person injured or threatened by transboundary pollution can bring an action in the state of origin.[85] The drafters did not define the words "transboundary pollution". They relied instead on the domestic law of enacting jurisdictions, but contemplated that the term would include land, air and water pollution.[86] As such, the Act conceivably applies in climate change litigation.

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[81] In the jurisdictional context, see *Peace River (Town) v British Columbia Hydro & Power Authority* (1972) 29 DLR (3d) 769 at 773, Johnson JA, concurring (Alta SC (AD)), leave to appeal to SCC refused, [1972] SCR ix; Stephen GA Pitel et al, *Private International Law in Common Law Canada: Cases, Text and Materials*, 4th ed (Toronto: Emond, 2016) at 680 [Pitel et al].

[82] Pitel et al, *supra* note 81 at 680, citing *Coady v Quadrangle Holdings Ltd*, 2015 NSCA 13, leave to appeal to SCC refused, [2015] 2 SCR vi. See also Reid Mortensen, "Homing Devices in Choice of Tort Law: Australian, British, and Canadian Approaches" (2006) 55:4 ICLQ 839 at 854.

[83] *Transboundary Pollution Reciprocal Access Act*, RSO 1990, c T.18; *The Transboundary Pollution Reciprocal Access Act*, SM 1985–86, c 11; *Environment Act*, SNS 1994–95, c 1, ss 145–55; *Transboundary Pollution (Reciprocal Access) Act*, RSPEI 1988, c T-5.

[84] *Uniform Transboundary Pollution Reciprocal Access Act*, (1982) 64 Unif L Conf Proc 504 [*Reciprocal Access Act*]. Also available online: Uniform Law Conference of Canada, "Uniform Transboundary Pollution Reciprocal Access Act, online: *ULCC/CHLC* <https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Transboundary-Pollution-Reciprocal-Access> [https://perma.cc/L3V2-C932].

[85] *Ibid*, s 2.

[86] *Ibid* at 506 (commentary to section 4 of the Act).

In addition to guaranteeing the jurisdiction of the courts in the state of origin (the place of acting), the Act requires those courts to apply their own law.[87] The drafters designed this choice of law provision to provide legal certainty: polluters on both sides of the border would expect the application of their home law, and victims would know precisely which law would apply should they choose to sue polluters where they operate.[88]

The choice of law provision contained in the *Reciprocal Access Act* contrasts sharply with the common law post-*Tolofson*. The Act imposes local law (the *lex fori*), which effectively coincides with the law of the place of acting in this context, as the Act only guarantees the jurisdiction of the courts in the state of origin. *Tolofson*, by contrast, rejected the *lex fori* orientation of previous choice of law rules and made the *lex loci delicti* prevail. It also acknowledged that the law of the place of injury might govern the dispute when the act and the injury occur in different states.[89] There is an irreconcilable conflict between *Tolofson* and the *Reciprocal Access Act*, but it seems clear that the latter overrides the former: clear legislation trumps the common law,[90] the Act is unambiguous and no province amended its statute after *Tolofson*.

The *Reciprocal Access Act*, however, rests on reciprocity, as its name suggests. For the Act to apply, both the state of origin and the affected state must enact its provisions or provide substantially equivalent access to their courts.[91] Eleven jurisdictions enacted the Act: Ontario, Manitoba, Nova Scotia and Prince Edward Island in Canada,[92] and Michigan, New Jersey, Wisconsin, Colorado, Oregon, Connecticut and Montana in the United States.[93] The Act is therefore unlikely to play a significant role in future climate change litigation, unless both the emitter and the victim are located in one of those rare enacting jurisdictions. Outside such scenarios, and absent further legislative intervention, courts in common law provinces will have to resort to the *lex loci delicti*.

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[87] *Ibid*, s 4.

[88] Uniform Law Conference of Canada, "Uniform Transboundary Pollution Reciprocal Access Act: Prefatory Note" (1982) 64 Unif L Conf Proc 498 at 503.

[89] See sections 1.1.1 and 1.1.2 above.

[90] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para 56.

[91] *Reciprocal Access Act*, *supra* note 84, s 1(1). Provinces can also designate reciprocating jurisdictions by regulation, as Ontario did: *Reciprocating Jurisdictions*, RRO 1990, Reg 1084.

[92] See *supra* note 83.

[93] Mich Comp Laws §324.1801–324.1807; NJ Rev Stat §2A:58A-1 to 2A:58A-8; Wis Stat §299.33; Colo Rev Stat §13-1.5-101–13.1.5-109; Or Rev Stat §468.076–468.089; Conn Gen Stat §51-351b; Mont Code §75-16-101 to 75-16-109.

1.2. Choice of law in the *Civil Code of Quebec*: the law of the (foreseeable) place of injury

A different choice of law framework applies in Quebec, although the CCQ also focuses on the place where torts occur. The first paragraph of article 3126 CCQ states that the law of the place of acting governs the issue of civil liability, except when a foreseeable injury appeared in another state, in which case the law of the place of injury may apply:

> 3126. The obligation to make reparation for injury caused to another is governed by the law of the State where the act or omission which occasioned the injury occurred. However, if the injury appeared in another State, the law of the latter State is applicable if the author should have foreseen that the injury would manifest itself there.
>
> In any case where the author and the victim have their domiciles or residences in the same State, the law of that State applies.[94]

Article 3126 CCQ thus frames the place of acting as the default connecting factor for civil liability and leaves the door open to the law of the place of injury, subject to a foreseeability requirement.[95] The Quebec Court of Appeal, however, strongly defers to the default rule. In *Wightman* and *Giesbrecht*, the Court of Appeal held that the law of the place of injury applies only exceptionally under article 3126 CCQ,[96] and not when it leads to a "chaotic" result because of the large number of victims spread across multiple states.[97] In doing so, the Court of Appeal gave particular weight to how the Supreme Court had defined the *lex loci delicti* in *Tolofson*,[98] and to the guiding principle of order in Canadian private international law.[99]

The Court of Appeal strove for a pragmatic, orderly and judicially convenient solution in complex cases involving many victims (wronged creditors in *Wightman*, and the victims of a plane crash in *Giesbrecht*). The same principle could certainly apply in climate change litigation, particularly if it involves a large group of victims spread across multiple jurisdictions, who bring a lawsuit in Quebec against a local GHG emitter. By the Court of Appeal's logic, applying the law of the place of each

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[94] Art 3126 CCQ. Article 3126 CCQ arguably encompasses both neighbourhood disturbance (art 976 CCQ) and civil liability claims (art 1457 CCQ): see by analogy *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 58.

[95] HP Glenn, "Droit international privé" in Barreau du Québec & Chambre des notaires, eds, *La réforme du Code civil*, vol 3 (Quebec: Presses de l'Université Laval, 1993) at 737.

[96] *Wightman c Widdrington (Succession de)*, 2013 QCCA 1187 at paras 183–84, leave to appeal to SCC refused, [2014] 1 SCR xiii [*Wightman*]. This was technically *obiter*, as the Quebec Court of Appeal applied the rules of private international law in force at the time of the event, prior to the adoption of the CCQ: *ibid* at para 99.

[97] *Giesbrecht c Succession de Nadeau*, 2017 QCCA 386 at para 28, leave to appeal to SCC refused, [2017] 3 SCR vii [*Giesbrecht*]; *Wightman*, *supra* note 96 at para 192.

[98] *Giesbrecht*, *supra* note 97 at paras 21–22.

[99] *Wightman*, *supra* note 96 at para 192.

injury would be unworkable and create chaos: Quebec law (the law of the place of acting) would apply to the claims of each victim instead.

The law of the place of acting may well be appropriate in this context, but *Wightman* and *Giesbrecht* read too much into article 3126 CCQ. First, the injury exception is not really an exception to a general principle, but a different connecting factor triggered by a different fact pattern (an act and an injury occurring in different states) which can frequently occur. Second, the CCQ makes no distinction between foreseeable damage to victims in a single state and foreseeable damage to victims in multiple states.[100] It is unclear how the Court of Appeal can apply the law of the place of acting in certain disputes but not others, given the clear wording of article 3126 CCQ.

Dubious interpretation aside, *Wightman* and *Giesbrecht* suggest that the law of the place of acting will apply by default in climate change litigation involving victims spread across multiple jurisdictions and suing a perpetrator in Quebec. The injury exception, however, remains crucial in litigation involving a single victim or multiple victims in a single state (for instance, a group of farmers affected by climate change). Article 3126 CCQ does not specify who can rely on this exception, but its logic is to benefit plaintiffs. In *Wightman*, the Court of Appeal blamed the defendants for trying to strategically avoid liability by relying on the law of the place of injury (Ontario). The Court of Appeal explained that in jurisdictions such as Europe, the rule of the place of injury was adopted "in order to protect victims and facilitate their access to a court likely to provide them with adequate compensation."[101] The Court of Appeal held that the injury exception in article 3126 CCQ reflects the same concern.[102]

The person who raises the injury exception must show that it was foreseeable that the injury would occur in that place.[103] Courts will assess foreseeability on an objective standard ("should have foreseen" in article 3126 CCQ)[104] but may consider the defendant's actual knowledge.[105] This analysis may be simple. A plant operator who discharges pollutants into a transboundary watercourse, for instance, can probably contemplate that damage will occur downstream, except perhaps if science is inconclusive. But the analysis becomes increasingly difficult as pollution becomes more diffuse or dispersed across larger areas. Climate change, of course, creates major difficulties. A defendant might convince the court that it could not anticipate the damage caused, either because available information did not reveal damage in the

[100] Gérald Goldstein, "Le caractère « exceptionnel » frappe encore! Une nouvelle victime par ricochet: la clause d'exception de l'art 3082 CCQ" (2018) 96:2 Can Bar Rev 402 at 406–408.

[101] *Wightman*, *supra* note 96 at para 193 (unofficial English translation available online on CanLII).

[102] *Ibid*.

[103] *Royal Bank of Canada c Capital Factors Inc*, 2013 QCCS 2214 at para 70 [*Royal Bank*].

[104] *British Airways, plc c Option Consommateurs*, 2010 QCCA 1134 at para 9. See also *Royal Bank*, *supra* note 103 at para 81.

[105] *Recherches internationales Québec c Cambior Inc*, 1998 CanLII 9780 at para 60 (Qc Sup Ct).

jurisdiction or because no scientific evidence indicated that its operations harmed the environment or contributed to climate change.[106] As a result, a case involving local GHG emitters and foreign victims would not necessarily lead to the application of law of the place of injury. On this point, article 3126 CCQ contrasts with the plaintiff-friendly approach to product liability claims under article 3128 CCQ. In this context, manufacturers cannot escape the law of the place of acquisition of the product even if they did not commercialize the product or expect it to be used there.[107] GHG emitters, by contrast, can evade the law of the place of injury when foreseeability is too difficult to establish in court.

Courts could conceivably interpret foreseeability as a mere *prima facie* requirement. In other words, plaintiffs would simply have to demonstrate that the defendant's activities could reasonably have *some* environmental consequences. If, for instance, a watercourse flowed from state *x* to state *y*, the very presence of that watercourse would suffice to establish foreseeability and trigger the law of the place of injury.[108] The exact cause of damage could be then left for trial, as a matter of causation. Yet even a mere *prima facie* requirement is difficult when the damage is more diffuse than in this example. Foreign victims of climate change who rely on the law of the place of injury (or injuries) would still struggle to meet their burden against a local GHG emitter. To make things worse, article 3126 CCQ refers to an injury *caused* to another person and *appearing* in another state – again, concepts that are difficult to reconcile with climate change. As a result, fallback to the law of the place of acting may be the only realistic option in some cases: the answer will depend on how many plaintiffs are involved and whether they are based in a single state or around the world.

Applying the usual choice of law rules for torts, however, is not always determinative. Both in common law provinces and in Quebec, certain mechanisms allow the courts to replace the applicable law with another. The next section explores these mechanisms and how they might apply in tort-based climate change litigation.

2. Displacing the applicable law: public law, public policy, and mandatory foreign laws as corrective mechanisms

This section addresses the displacement of the substantive law designated by choice of law rules (the *lex loci delicti* in common law provinces, and article 3126 CCQ in

[106] Even though we know that "[g]lobal climate change is real, and […] that human activities are the primary cause" (*Reference re Greenhouse Gas Pollution Pricing Act*, *supra* note 16 at para 7).

[107] Art 3128 CCQ. cf *Convention on the Law Applicable to Products Liability*, 2 October 1973, 1056 UNTS 187, art 7 (entered into force 1 October 1977). On article 3128 CCQ, see generally Kim Thomassin & Martin Boodman, "Choice of Law and Manufacturer's Liability in Quebec" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2012* (Toronto, Carswell, 2012) at 228.

[108] Gérald Goldstein & Ethel Groffier, *Droit international privé*, vol 2 (Cowansville: Yvon Blais, 2003) at no 477 [Goldstein & Groffier].

Quebec[109]). The law designated by choice of law rules, however, can sometimes be displaced in favour of another: foreign law can be displaced by local law (2.1) and any law can be displaced by a mandatory provision of foreign law (2.2).[110] These mechanisms will not play a major role in climate change litigation as they are both extremely narrow and fact specific. They do raise, however, some difficult questions in this context.

2.1. Refusal to apply foreign law

When choice of law rules lead to foreign law, courts may rely on the public law exception (2.1.1) or the public policy exception (2.1.2) to apply their own law instead.[111]

2.1.1. The public law exception

Canadian courts traditionally refuse to apply foreign public laws, believing those laws to be the product of the foreign state's sovereign power within its territory: as such, no other court should enforce them. This is the infamous "public law taboo"[112] which is particularly strong in the areas of penal[113] and tax law.[114] As Blom explains, "[i]t is a virtually universal feature of systems of private international law that courts will not apply foreign laws whose purpose is to levy taxes or enforce penal sanctions."[115] The rule prohibits direct application of foreign penal and tax laws as a result of choice of law rules. It also prohibits their indirect application, that is, the enforcement of foreign judgments based on penal and tax laws.[116]

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[109] The *Reciprocal Access Act*, *supra* note 84, which favours the *lex fori* in the courts of the place of acting, does not formally incorporate any of the exceptions below.

[110] Mandatory local laws, by contrast, override the entire choice of law analysis in favour of local law (unlike the public law or public policy exceptions which correct the application of choice of law rules after the fact): see the text accompanying note 30 above.

[111] In Quebec, article 3082 CCQ also provides that another law can apply if the dispute is remotely connected with the designated law and much more closely connected to another. This provision is unlikely to play a determinative role in climate change litigation: article 3126 CCQ can lead to the law of the place of acting or the law of the place of injury, and both places will generally be sufficiently closely connected to the dispute to prevent the application of article 3082 CCQ. On article 3082 CCQ, see *Giesbrecht*, *supra* note 97 at paras 32–36.

[112] Matthias Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle" (2020) 16:1 J Priv Intl L 1 at 6.

[113] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 34.

[114] Art 3155(6°) CCQ; *United States of America v Harden*, [1963] SCR 366 at 369–71.

[115] Joost Blom, "Public Policy in Private International Law and Its Evolution in Time" (2003) 50:3 Nethl Intl L Rev 373 at 378 [Blom].

[116] See generally Felix D Strebel, "The Enforcement of Foreign Judgments and Foreign Public Law" (1999) 21:1 Loy LA Intl & Comp LJ 55.

Penal and tax laws are the two most accepted categories within the public law exception. Some cases, however, suggest a third, residuary category of "other foreign public laws" which should not be enforced.[117] This third category is less clearly established than the other two,[118] but leading English[119] and Canadian[120] texts discuss it. The scope of the public law exception has attracted much debate: is there a third category of unenforceable foreign public laws? Does it cover all public laws and if so, on what basis? If it exists, the exception has implications in transboundary environmental disputes because plaintiffs often rely on statutory causes of action found in "public" legislation.

In Canada, the Ontario Court of Appeal clarified the law in *Ivey*.[121] The U.S. Environmental Protection Agency (EPA) had obtained judgments in Michigan under CERCLA, a statute governing liability for contaminated sites.[122] The judgments ordered that Liquid Disposal (a Michigan corporation), as well as related entities in Ontario, reimburse the cleanup costs incurred by the EPA on a site operated by Liquid Disposal in Michigan. U.S. authorities then sought to enforce the judgments in Ontario. The defendants resisted enforcement and argued that the basis of the Michigan judgments was a foreign public law. As such, courts could not enforce the U.S. judgments in Canada.

Justice Sharpe (a trial judge at the time) found that CERCLA was neither penal nor fiscal: it pertained to the reimbursement of costs already incurred and was therefore compensatory in nature.[123] He recognized the existence of a third category of public laws but criticized its "rather shaky foundation" and held that it did not preclude the enforcement of the Michigan judgments.[124] Environmental statutes, he said, supplement the common law and help impose liability on polluters: precluding

[117] See eg *United States of America v Inkley*, [1988] 3 All ER 144 (CA) at 149–50; *Attorney-General of New Zealand v Ortiz*, [1982] 3 All ER 432 at 459 (CA) (Lord Denning), aff'd [1983] 2 All ER 93 (HL).

[118] International Law Association, "International Committee on Transnational Recognition and Enforcement of Foreign Public Laws – Report" (1988) 63 Intl L Assoc Reports of Conferences 719 (noting that "there probably is not, and certainly should not be, any rule of general application requiring rejection of so-called foreign public laws" at 755).

[119] See eg Lawrence Collins & Jonathan Harris, eds, *Dicey, Morris & Collins on the Conflict of Laws*, vol 1, 16th ed (London: Sweet & Maxwell, 2022) at nos 8.013–23; Paul Torremans et al, *Cheshire, North & Fawcett: Private International Law*, 15th ed (Oxford: Oxford University Press, 2017) at 123–25, 552–53.

[120] Pitel & Rafferty, *supra* note 59 at 39–41; Walker, *supra* note 46, §16.07.

[121] *United States of America v Ivey* (1996), 30 OR (3d) 370 (CA), leave to appeal to SCC refused, [1997] 2 SCR x [*Ivey* CA].

[122] *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, Pub L No 96-510, 94 Stat 2767 (1980) (codified as amended at 42 USC § 9601–9628).

[123] *United States of America v Ivey* (1995), 26 OR (3d) 533 at 544–45 (Gen Div), aff'd (1996), 30 OR (3d) 370 (Ont CA), leave to appeal to SCC refused, [1997] 2 SCR x [*Ivey* Gen Div].

[124] *Ibid* at 548.

their transboundary enforcement defeats that purpose.[125] The Ontario Court of Appeal upheld Justice Sharpe's judgment: it recalled that many jurisdictions have similar regimes and that comity supported their mutual enforcement.[126]

Overall, *Ivey* significantly reduced the scope of the public law exception in Canada, without closing the door to it completely.[127] The same is true in Quebec, as nothing in the CCQ prevents the application of *all* foreign public laws. Article 3080 CCQ provides that when the law of a foreign state applies, it applies to the exclusion of its rules of private international law.[128] Even though article 3080 CCQ is primarily concerned with *renvoi*,[129] its wording arguably excludes other implicit carve-outs, such as foreign public law as a whole.[130]

Ivey suggests that if foreign law applies in a climate change lawsuit, Canadian courts will not displace it on the mere basis that it contains foreign environmental statutes of a public nature (for instance, a statute which provides a statutory cause of action or a right to a clean or healthy environment) alongside rules of "pure" private law. If a foreign statute remains compensatory in nature, not penal, the public law exception is unlikely to come into play and courts will apply foreign environmental law in its entirety.

2.1.2. The public policy exception

Courts can also refuse to apply foreign law on the basis of public policy. The common law precludes the application of foreign laws which shock basic morality.[131] The CCQ similarly precludes the application of foreign laws which lead to a result "manifestly

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[125] *Ibid* at 549.

[126] *Ivey* CA, *supra* note 121 at 374.

[127] This is consistent with English cases holding that not all foreign public laws are unenforceable, only those involving sovereign rights: see eg *Skatteforvaltningen (the Danish Customs and Tax Administration) v Solo Capital Partners LLP*, [2023] UKSC 40 at paras 53–57; *Islamic Republic of Iran v The Barakat Galleries Ltd*, [2007] EWCA Civ 1374 at para 125; *Mbasogo v Logo Ltd*, [2006] EWCA Civ 1370 at paras 50–51.

[128] Art 3080 CCQ. cf *Loi fédérale sur le droit international privé*, RS 291, RO 1988 1776, s 13 (Swiss statute providing that foreign law is not excluded simply because its provisions have a public law character).

[129] *H(JS) c F(BB)*, 2001 CanLII 25570 at paras 173–77 (Qc Sup Ct).

[130] See, on this point, Guillaume Laganière, "Dialogue des systèmes en droit international privé: l'application et la reconnaissance du droit public étranger au Québec" in Jérémie Torres-Ceyte, Gabriel-Arnaud Berthold & Charles-Antoine Péladeau, eds, *Le dialogue en droit civil* (Montreal: Thémis, 2018) 35 at 41–44. See also *Sharp v Autorité des marchés financiers,* 2023 SCC 29 (holding that Quebec rules of private international law "extend beyond the narrow scope of private law and also apply, as part of the *jus commune* of Quebec, in public and administrative law contexts" at para 61).

[131] *Das* ONCA, *supra* note 76 at paras 96; *Block Bros Realty Ltd v Mollard* (1981), 122 DLR (3d) 323 at 329 (BC CA).

inconsistent with public order as understood in international relations."[132] Like the public law exception, the public policy exception operates both directly (to block the application of foreign law) and indirectly (to block the enforcement of a foreign judgment).

The public policy exception "should be invoked exceptionally and with significant care."[133] It seldom (if ever) applies in interprovincial cases,[134] and it is narrowly construed even in international cases, preserving only the most basic moral tenets of society. As the Supreme Court of Canada put it in the context of foreign judgments, "[t]he public policy defence turns on whether the foreign law is contrary to our view of basic morality."[135] Later, in a case involving the CCQ, the Court explained that "a foreign decision will not be recognized if its outcome runs counter to the moral, social, economic or even political conceptions that underpin Quebec's legal order".[136] The same rule applies in the choice of law context.[137]

Litigants have raised the public policy exception only on a few occasions in relation to foreign environmental statutes, all in common law provinces and in the context of foreign judgments.[138] No attempt has been successful, but the argument remains conceivable in tort-based climate change litigation. A local GHG emitter, for instance, could try to avoid overly stringent foreign environmental laws that jeopardize the economic interests of the forum. Conversely, a victim could try to block overly lenient foreign laws which contradict basic environmental tenets such as the polluter-pay principle.[139] This argument is bolstered by the Supreme Court's recognition of

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[132] Art 3081 CCQ.

[133] *Zurich Life Insurance Company Limited v Branco*, 2015 SKCA 71 at para 171, leave to appeal to SCC refused, [2016] 1 SCR vii.

[134] *Tolofson*, *supra* note 31 at 1055.

[135] *Beals v Saldanha*, 2003 SCC 72 at para 71 (emphasis omitted). In the choice of law context, see *Boardwalk Regency Corp v Maalouf* (1992), 6 OR (3d) 737 at 743 (CA).

[136] *RS v PR*, 2019 SCC 49 at para 53. See also *Awanda c AMBC Ventures Inc*, 2022 QCCA 1133 at para 25, leave to appeal to SCC refused, 2023 CanLII 31578 (public policy exception to the enforcement of foreign judgments under article 3155(5°) CCQ).

[137] *Eurobank Ergasias c Bombardier Inc*, 2022 QCCA 802 ("[…] public policy considerations may compel a Quebec court to disregard a foreign law or a foreign judgment, more particularly when the outcome of that law or that judgment is inconsistent with public order as understood in international relations" at para 67).

[138] *Yaiguaje v Chevron Corporation*, 2017 ONSC 135 at paras 108–112, leave to appeal to Div Ct refused 2017 ONSC 2251; *United States of America v Shield Development Co* (2004), 74 OR (3d) 583 at 593–94 (Sup Ct), aff'd (2005), 74 OR (3d) 595 (CA); *Ivey* Gen Div, *supra* note 123 at 554.

[139] See by analogy Goldstein & Groffier, *supra* note 108 at no 477. The polluter-pay principle "has become firmly entrenched in environmental law in Canada": *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 23.

environmental protection as "a fundamental value in Canadian society"[140] and its acknowledgment of the "extreme consequences" of global warming.[141] The public policy exception, in this scenario, may even include fundamental precepts of international environmental law.[142] Evidently, however, not all environmental disputes will implicate basic morality to a point where the public policy exception comes into play, in one way or the other. Such cases will be peculiar and exceptional (but again, so is the magnitude of climate change and its impact on the law).

2.2. Mandatory foreign laws

Finally, Canadian courts may displace the applicable law by applying mandatory *foreign* laws. They may refuse, for instance, to enforce contracts that require the parties to breach foreign law in order to perform their obligations.[143] They may also refuse to issue an order requiring a person residing in a foreign jurisdiction to break the law of that jurisdiction.[144]

In Quebec, article 3079 CCQ is more explicit and wide-ranging, but equally exceptional. It allows for the application of mandatory provisions of foreign law "[w]here legitimate and manifestly preponderant interests so require."[145] In addition, the dispute must be closely connected with the foreign state and the court must have considered the purpose of the foreign law and the consequences of its application.[146] The test is stringent: despite several attempts, no litigant has met its requirements since it came into force in 1994.

Deferring to mandatory foreign laws fosters international comity by recognizing the interest of foreign states in promoting their own legislative policies. But this deference stops when the interests of the forum begin. Early cases required Quebec courts to balance foreign bank secrecy provisions against the full disclosure of evidence and the principle of open justice. The latter prevailed on the basis that they

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[140] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at 1076, cited in *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 7; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1.

[141] *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 16 at para 9.

[142] For an argument in this sense, see *Juris-classeur environnement et développement durable* (online), "Droit international privé et environnement", fasc 2030 at para 50 by Olivera Boskovic (updated 2014). See also, by analogy, Jeffrey Talpis and Shelley L Kath, "The Exceptional as Commonplace in Quebec *Forum Non Conveniens* Law: *Cambior*, A Case in Point" (2000) 34:3 RJT 731 at 860–62.

[143] *Gillespie Management Corp v Terrace Properties* (1989), 62 DLR (4th) 221 at 222 (BC CA) (Southin JA, concurring).

[144] *Frischke v Royal Bank of Canada* (1977), 17 OR (2d) 388 at 399 (CA).

[145] Art 3079 CCQ.

[146] *Ibid*.

were matters of public concern in Quebec.[147] The door to foreign mandatory laws may not be as tightly shut to environmental protection as it is to foreign bank secrecy. The expression of a strong legislative preference for environmental protection in a foreign state could supplant an overly lenient local law precisely since the environment is a matter of public concern. A court might consider that the interests at stake are sufficiently legitimate and manifestly preponderant under article 3079 CCQ if they concern the well-being of a large population affected by climate change. Defendants could raise countervailing considerations related to the forum's economic and industrial policy, for instance, but the argument is at least conceivable in law.

Defendants, too, could attempt to rely on article 3079 CCQ, this time by pleading that they are formally authorized to operate under their own law. The question then becomes whether the law of the place of acting (where a licence was issued) overrides the applicable law and exonerates the defendant on the basis that it is mandatory. It is unlikely that such argument will succeed given the forum's interest in preventing or compensating environmental harm suffered on its territory. Some authorities also suggest that a foreign licence cannot shield polluters from the consequences of their conduct that are felt outside the jurisdiction in which they operate.[148] On this view (and although the law is not settled on this point), the law applicable as a result of choice of law rules will determine whether and how Canadian courts may take foreign licences into account.[149]

Conclusion

Justice La Forest pointed out in *Tolofson* that "[o]ne of the main goals of any conflicts rule is to create certainty in the law."[150] Litigants caught in a web of overlapping legal systems require predictability. As Professor Castel argued, "[a] decision should not depend on the fortuitous place of trial or the dubious selection of the applicable law by the courts."[151] Regrettably, the Canadian choice of law framework offers little certainty to those who seek to engage in tort-based climate change litigation. The Supreme Court of Canada has never cleared the uncertainty surrounding *Tolofson*'s caveat and how it might apply to complex torts other than defamation. The *Reciprocal Access Act* has never been judicially tested, which is unsurprising given the Act's narrow scope. Finally, the Quebec Court of Appeal has only dealt with article 3126

[147] *Globe-X Management Ltd (Proposition de)*, 2006 QCCA 290 at paras 43–48, leave to appeal to SCC refused, [2006] 2 SCR xiii; *Banque Paribas (Suisse) SA c Wightman*, 1997 CanLII 10291 (Qc CA).

[148] *Interprovincial Co-operatives v R* (1975), [1976] 1 SCR 477 ("[…] there is bound to be doubt whether a foreign jurisdiction can license the pollution of waters in a neighbouring state so as to provide a defence to an action brought in the latter for injury to property therein" at 506, Laskin CJC, dissenting).

[149] Goldstein & Groffier, *supra* note 108 at no 477.

[150] *Tolofson*, *supra* note 31 at 1061.

[151] Jean-Gabriel Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52:3 McGill LJ 555 at 559.

CCQ twice, in cases which share few of the attributes of an environmental dispute. Legislative reforms are nowhere in sight, and a statutory choice of law rule similar to article 7 of the *Rome Regulation* remains unlikely in the short term, in any of the provinces and territories.

Climate change is a challenge for tort law as a whole.[152] Governments, judges and litigants will adjust, and in the meantime, legal uncertainty is perhaps unavoidable. Nonetheless, choice of law is a fundamental aspect of climate change litigation which deserves our attention. As former Secretary General of the Hague Conference on Private International Law Hans van Loon noted, "transnational tort law has gained increased prominence in environmental matters [and] its role may well further expand in light of the concerns about climate change."[153] Regardless of their outcome, choice of law rules participate in the legal oversight of GHG emissions simply by *engaging* domestic law – in other words, by bringing transnational wrongdoers within the purview of state regulation through domestic courts.[154] An acute understanding of the operation of choice of law rules is therefore critical to fully assess the viability and the potential of tort-based climate change litigation in Canada. Both GHG emitters and the victims of climate change expect no less.

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[152] See generally Douglas A Kysar, "What Climate Change Can Do About Tort Law" (2011) 41:1 Envtl L 1.

[153] Hans van Loon, "The Global Horizon of Private International Law" (2016) 380 Rec des Cours 9 at 98.

[154] See generally Uglješa Grušić, "International Environmental Litigation in EU Courts: A Regulatory Perspective" (2016) 35 YB Eur L 180 at 189–90; Jonas Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Jonas Ebbesson & Phoebe Okowa, eds, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2009) 270 at 281–82; Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age" (2002) 40:2 Colum J Transnat'l L 209 at 253–54.